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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-957

CHARLES J. PANARELLA,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent,

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Respondent's Brief in Opposition to Petition for Certiorari.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent opposes certiorari herein and submits this brief to demonstrate that the cause involves no question of law warranting review by this court.

Question Presented

The only real question presented here is whether this case concerns a question of law of genuine importance to the general public as distinguished from the sole self-interest of the petitioner.

The answer is unequivocally in the negative.

Statement of the Case

On April 22, 1972, FBI agents, aided by the New York State Police, set up surveillance over the farmhouse of Alphonse Persico on Blue Mountain Road in the Town of Saugerties in Ulster County. The agents had a federal arrest warrant for Persico but deferred its execution until the subject left the family quarters the next morning. When Persico and a companion drove away in the morning, a second car closely tailgated the Persico vehicle. Defendant drove the second car with Antionette Perrotti passenger in the front seat and John Pate passenger in the rear seat. As the FBI agents crowded the two vehicles to a halt, defendant was seen to pass or toss something over the front backrest into the rear of his car. When the three occupants were removed from that car, the federal agents observed on the rear well behind the right front seat two loaded revolvers.

Defendant and his companions were arrested and arraigned in a local criminal court on a felony complaint charging them with unlawful possession of loaded handguns. All were promptly released on minimal bail. While the felony complaint was still pending in the local criminal court, the arrestees moved on May 24, 1972 in New York Supreme Court of Ulster County, to suppress the physical evidence. Although the motion appeared repeatedly on court calendars, no action was ever taken thereon in the Supreme Court. Meanwhile, the local District Attorney had agreed with the United States Attorney for the Southern District of New York to defer the Panarella case until dispostion of the Persico case in the federal court. As a result, no indictment was returned by the Ulster County Grand Jury until February 27, 1974 when defendant and Pate were jointly charged in a two count indictment with criminal possession of dangerous weapons (NYPL 265.05, subd. 2). Prior thereto, Antionette Perrotti was fatally injured in an automobile accident.

On June 12, 1974, defendants moved in County Court, where the case was pending, to dismiss the indictment for the alleged denial of their guaranteed right to a speedy trial. After a full scale hearing, the County Court granted the motion and

dismissed the indictment. However, on the People's appeal, the Appellate Division of the New York Supreme Court, Third Department, reversed, on the law and the facts, denied the motion to dismiss and reinstated the indictment (*People v. Panarella,* 50 AD 2d 305). Thereafter, defendants again moved on August 12, 1976 to suppress the handguns on the ground that the federal agents lacked probable cause to stop the car driven by defendant. After a testimonial hearing, the County Court found that the officers had reasonable cause for their actions and denied the motion to suppress.

At the ensuing trial, two FBI agents testified that as their car crowded defendant's car onto the shoulder of the road, they saw defendant pass something over the front seat before the car stopped. One of the agents also testified that when he peered into defendant's car from the outside, he observed two loaded revolvers on the rear floor directly behind the front seat on the passenger's side. Further evidence established the other essential elements of the charge.

Defendant did not take the stand but his co-defendant, who was granted a severance just before the jury selection began, did. Pate tendered an explanation of defendant's front seat movements and flatly denied that defendant passed anything at all over the front seat. When cross-examined concerning the ownership of the two guns, Pate invoked his Fifth Amendment rights. Since the People disclaimed reliance upon the statutory presumption (PL 265.15, subd. 3), the only question for the jury's determination involved the issue of credibility.

The Appellate Division (66 AD2d 968) affirmed the conviction by a split vote. The majority held that the verdict was supported by both direct and circumstantial evidence, while the dissenters declared that the evidence was entirely circumstantial and that the People's proof did not exclude defendant's innocence to a moral certainty.

The Court of Appeals on November 15, 1979 (_____ NY2d_____) affirmed such decision on the memorandum of the intermediate appellate court, except as said opinion suggested there was direct evidence in the record to support the conviction.

POINT I

Since defendant's successive attorneys had acquiesced to the delay herein, defendant was not deprived of his right to a speedy trial.

Defendant intends that when the New York appellate courts reinstated the indictment, a determining weight was improperly given to his attorney's acquiescence to the trial delay.

Weighing the particular circumstances of this case on the scale of factors formulated by *Barker v. Wingo* (407 US 514), the guideline factors were found to balance evenly, except for the factor of waiver. Any examination of the balancing merits of that factor disclosed an implied, if not expressed, consent of defense counsel to definite delay of the trial until certain events transpired. The record reflects the ready willingness of the defense to let the case drag by its heels—and perhaps be forgotten.

Because the factors featured in *Barker v. Wingo, supra,* contributed no determinative weight to the instant scale, it was fitting that a further feature be found to resolve the balance. (*cf, People v. Taranovich,* 37 NY2d 442).

POINT II

Consent by defense counsel to trial delay constitutes waiver of one's right to a speedy trial.

At this late stage of proceedings, defendant proposes a discernible difference in the speedy trial context between an attorney's acquiescence to trial delay and a defendant's voluntary waiver of a constitutional right.

Defendant argues that the New York appellate courts accepted less than defendant's voluntary surrender of his guaranteed right to a speedy trial, when the Appellate Division found that defendant's attorney had agreed to the trial delay. It

matters not how defendant now describes or defines his attorney's act, the fact is that this court considers either event to be a waiver of the right (*Barker v. Wingo,* 407 US 514, *supra*).

The Appellate Division which considered the question and resolved the issue on its legal merits (*People v. Panarella,* 50 AD2d 304) was no more confused by the facts than was defendant who, by changing his local counsel three times, maintained complete control over his attorney at all times.

POINT III

The stop of the two automobiles by the federal agents was proper and the seizure of the exposed handguns was justified.

Lastly, defendant contends that the FBI agents had no legal cause to stop or search his car; citing some recent decisions of this court involving investigative stops and invasions of privacy. The cases are not at all akin to the instant situation.

Here, the agents were lawfully engaged in the execution of an arrest warrant. They saw the two vehicles leave the farm together and proceeded in a tight tandem style. They could rightly assume that the occupants of the second car were "riding shotgun" for the first car and that the first car could not be stopped without also stopping the car. Routine procedures dictated that precautions be taken for the agents' personal safety and security.

In denying defendant's motion to suppress the handguns, the hearing court found, and the appellate courts affirmed the finding, that it was reasonable for the FBI agents to stop defendant's car to insure their own safety and well being. The record supports no other conclusion.

CONCLUSION

Because this case does not raise any question of law of public interest which warrants review by this court, the petition for certiorari should be denied.

Respectfully submitted,

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